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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

## No. 1318

VIOLA ROGERS, GUARDIAN, ET AL.,
Petitioners,

vs.

RAY GARDNER FLYING SERVICE, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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OCTOBER TERM, 1970

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No.

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VIOLA ROGERS, GUARDIAN, ET AL.,
Petitioners,

versus

RAY GARDNER FLYING SERVICE, INC., ET AL.,
Respondents

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on November 16, 1970.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit and the Per Curiam opinion denying Petitioners' Petition for Rehearing and Petition for Rehearing En Banc are attached hereto in Appendix A.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 16, 1970.

A Petition for Rehearing and Petition for Rehearing En Banc was timely filed and denied on December 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether Title 49, U.S.C. § 1301 (26) preempts the Oklahoma law of bailments as it bears upon the liability of an owner-lessor of an airplane for the negligent acts of a non-agent operator-lessee.

## STATUTES INVOLVED

This case involves the construction of Title 49, U.S.C., § 1301 (26), which provides:

"§1301. Definitions

As used in this chapter, unless the context otherwise requires —

• • • • •

(26) 'Operation of aircraft' or 'operate aircraft' means the use of aircraft, for the purpose of air navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter."

Title 49, U.S.C., § 1550 provides:

"(a) It shall be unlawful —

• • • •

(3) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter;".

## STATEMENT OF THE CASE

This is a wrongful death action arising out of the crash of a private plane on January 2, 1957, near Ardmore, Oklahoma. Killed in the crash were Gordon Hunter, the pilot, Johnnie R. Hunter, his wife, and Ella Dunn, his sister-in-law. The plaintiffs-petitioners are Mr. and Mrs. Rogers who are the natural parents of Johnnie R. Hunter and Ella Dunn. Federal jurisdiction is based upon diversity of citizenship. Mr. and Mrs. Rogers sued individually and Mrs. Rogers asserted a separate claim as guardian of the minor children of Johnnie R. Hunter by a previous marriage.

The defendants below, respondents here, are Ray Gardner Flying Service, Inc., a fixed base operator in Wichita Falls, Texas, and Ray Gardner, the president of the corporation.

The plane involved in the crash was owned by Les Wilson and had been leased by Wilson to the corporate respondent, which in turn rented it to Hunter under an oral agreement.

The single thrust of this cause of action against respondents is that by operation of Title 49, U.S.C., § 1301 (26), the respondents are vicariously liable for the negligence of the pilot Hunter. This issue was raised before the district court by respondents' motion for summary judgment. The district court denied the motion, concluding:

> "The Oklahoma Constitution and statutes create a cause of action for wrongful death for recovery of damages from persons responsible for the wrongful death. It does not specify the persons who are responsible. The Federal Aviation Act (49 U.S.C. sec. 1301 (26)) provides that the owner or lessee is 'deemed to be engaged in the operation of the aircraft.' It is the obvious intent of Congress from this act and a later amendment 49 U.S.C. 1430 that the owner or lessee of an aircraft is responsible for the negligent operation of his aircraft.
>
> "Section 83(c) of the Oklahoma Aeronautic Commission Act in stating that one of its purposes is to assist in 'accomplishing the purposes of federal legislation' makes clear that Oklahoma has endorsed and by implication adopted the intent Congress expressed in enacting the Federal Aviation Act. In addition Oklahoma does not have any statute contrary to the provision of the Federal Aviation Act providing for the responsibility of the owner or lessee for the negligence of the pilot.

"It is the conclusion of this Court that the Federal Aviation Act does not create a right or cause of action for wrongful death, but does provide the source for establishing owner and lessee responsibility for the negligence of the pilot, the cause of action being created by the Oklahoma wrongful death statute. [citing cases." (Emphasis added).

The district judge certified that her order overruling respondents' motion for summary judgment involved a controlling question of law and a panel of the Court of Appeals for the Fifth Circuit allowed an appeal under Title 28, U.S.C., § 1292 (b). The Fifth Circuit reversed and remanded the case with directions to enter summary judgment in favor of the respondents.

## REASONS FOR GRANTING THE WRIT

By judicial fiat the Fifth Circuit has completely stripped the Federal Aviation Act of 1958 of one of its most important provisions. While recognizing that "under its commerce clause powers Congress could pre-empt state law with regard to the liability for injuries resulting from air crashes," the Court completely disregarded its own earlier interpretation of Section 1301(26) in *Hays v. Morgan*, 221 F.2d 481 (5th Cir., 1955), as well as *Sosa v. Young Flying Service*, 277 Fed. Supp. 554 (S.D. Texas, 1967); *Lamasters v. Snodgrass*, 248 Iowa 1377, 85 N.W.2d 622 (1957); *Hoebee v. Howe*, 98 N.H. 168, 97 A.2d 223 (1953) and *Ross v. Robert G. Apple, d/b/a Sheridan Airport*, 240 N.E.2d 825 (Ind. App., 1968). These cases all recognize that by enacting

the Federal Aviation Act, Congress pre-empted the field of air regulation and did in fact make provision for establishing responsibility for pilot negligence.

The Federal Aviation Act of 1958, 49 U.S.C.A. § 1301, et seq. and its predecessors is the most comprehensive legislation ever written concerning the safe control and efficient regulation of air commerce. As stated by Mr. Justice Jackson in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944):

> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government." 322 U.S. at p. 303.

In Kreindler, *Aviation Accident Law*, Vol. 1, § 10.01 [1], p. 321, the author states:

> "The Federal Aviation Act of 1958 is the most important source of law in the aviation law field. Its importance and effect, in many areas, cannot be exaggerated. It is the basic law of the land concerning aviation."

By its passage Congress created an independent agency, the Federal Aviation Agency, in which control was placed over all navigable air space in the United States for all civilian and military air traffic.

> "The Federal Aviation Act was passed by Congress for the purpose of centralizing in a single authority — indeed, in one administrator — the power to frame rules for the safe and efficient use of the nation's air space. . . ." *Airline Pilots Association International v. Quesada*, 276 F.2d 892, 894 (2nd Cir., 1960).

More important, under the provisions of this Act Congress has centralized in a single authority the power to promulgate rules and regulations regulating and prohibiting various types of conduct. These rules and regulations have the force and effect of law, *Maryland Casualty Co. v. U.S.*, 251 U.S. 342, 40 S. Ct. 155, 64 L.Ed. 297 (1920); *Hochrein v. U.S.*, 233 F.Supp. 317 (E. D. Pa., 1965), and when the operator of an aircraft violates these regulations, he is guilty of negligence as a matter of law: *San Diego Gas & Electric Co. v. U.S.*, 173 F.2d 92 (9th Cir., 1949); *Eastern Air Lines v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955).

The congressional history of the Federal Aviation Acts clearly show that Congress intended to make the bailor of an aircraft responsible for the negligence operation of his aircraft. This is best illustrated by focusing attention on the original language of the Act and then considering the effect of a later amendment which specifically withdrew responsibility from a specified category of owners.

Section 1430 of 49 U.S.C.A. provides, in part:

> "(a) It shall be unlawful —
>
> • • •
>
> (5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter;"

Section 1301(26) of 49 U.S.C.A. specifically defines "operation of aircraft" as follows:

> "'Operation of aircraft' or 'operate aircraft' means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. *Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.*" (Emphasis added).

The above quoted provision was originally enacted in the Civil Aeronautics Act of 1938, 49 U.S.C.A. § 401(26).

In 1948, Congress amended the Act by adding Section 524 [now 49 U.S.C.A. § 1404], which provided in part, as follows:

> "No person having a security interest in, or security title to, any civil aircraft * * *, and no lessor of any such aircraft under a bona fide lease of thirty days or more, shall be liable * * *, for any injury to or death of person, * * *, unless such aircraft is in the actual possession or control of such person at the time of such injury, death, damage or loss."

Accordingly, although Congress expressly relieved security holders and certain lessors from liability if they were not in control of the operation of the aircraft, they left intact the financial responsibility and liability of others, even though they exercised no control over the operation of the aircraft. This intended result was made clear in the House Committee Report on the amendment which, as the reason for exempting security holders and certain lessors, stated:

> "Provisions of present Federal and State law might be construed to impose upon persons who are owners of aircraft for security purposes only, or who are lessors of aircraft, liability for damages caused by the operation

> of such aircraft even though they have no control over the operation of the aircraft. This bill would remove this doubt by providing clearly that such persons have no liability under such circumstances." *U.S. Congressional Code Service, 1948, 80th Congress, 2nd Session, p. 1836; House Report, No. 2091, 80th Congress, 2nd Session.*

In *Hays v. Morgan*, 221 F.2d 481 (5th Cir., 1955), the Fifth Circuit considered the effect of the 1948 amendment and concluded that Congress intended to relieve from liability only the security holders and lessors enumerated in Section 524. The court said:

> "But their [defendants] arrangements with these pilots does not bring them within the exemption of the act, *which shows a federal legislative intention to hold the owner liable as as operator*, and to relieve lienors and lessors only under conditions that are not present here." at p. 482. (Emphasis added).

The reference in the above quotation to the "act" refers to the Civil Aeronautics Act of 1938, 49 U.S.C.A. § 401 et seq. and specifically to § 401(26), the identical provision carried forward into the Federal Aviation Act of 1958 and at issue in our case.

Other cases have interpreted Section 1301(26) in the same manner.

In *Heebee v. Howe*, 97 A.2d 223 (New Hampshire Sup. Ct. 1953), suit was brought by a father for injuries to his minor son sustained when a low flying airplane scared a horse. The plane belonged to the defendant Skyhaven and had been rented to a student pilot. In holding the owner, Skyhaven responsible for the negligence of the pilot to whom it had rented its aircraft, even though contrary to its common law where no agency relationship existed, the court stated:

> "The first question which we shall consider is whether the Court's ruling is correct that certain state and federal statutes are a basis for liability of the defendant, Skyhaven, Inc. At the outset it should be noted that the effect of either the *federal* or state statute, if applicable at all, would be substantially the same applied to an intrastate flight such as was being made here. ..." at p. 225. (Emphasis added).

The court quoted a New Hampshire statute which codified verbatim the provisions of 49 U.S.C.A. § 1301 (26) and compared another provision from the state and federal acts, stating:

> "Both acts also contain substantially the same language relative to liability, that 'It shall be unlawful. ***, For any person to operate or authorize the operation of aircraft in violation of any other rule or regulation' issued under the authority of the act. C. 306, § 26, par. VII, Supra; ..."

The court further concluded:

> "• • • It seems to us from reading our act that the intent of our Legislature is clearly to place responsibility on the owner, even though he be without control, for the conduct of one to whom he entrusts the plane. The language is unequivocal and without qualification expressed or reasonably to be implied." 97 A.2d at p. 225.

After considering the congressional history of the Federal Act, the court held:

> "... Accordingly we hold the Trial Court correctly charged that casual violation of the state or *federal* statutes or any rules or regulations thereunder by the pilot of the plane would, in the absence of the plaintiff's contributory negligence, render the defendant Skyhaven liable." 97 A.2d at p. 226. (Emphasis added).

In *Lamasters v. Snodgrass*, 85 N.W.2d 622 (Iowa Sup. Ct., 1957), suit was brought against the owner of an aircraft for injuries to a passenger caused by the negligence of the pilot. There was no claim of an agency relationship between the pilot and the owner. The opinion in this case commences:

> "The sole question presented by this appeal is whether an owner who authorizes an-

other to fly his airplane is liable for the negligence of the pilot. * * *" 85 N.W.2d at p. 682.

After referring to a similar state statute, the court considered the provisions of the Federal Act as well as the amendment (49 U.S.C.A. Sec. 524) appearing in U. S. Code Congressional Service 1958, 85th Congress, Second Section, 1836. Citing *Hays v. Morgan*, 221 F.2d 481 (5th Cir., 1955) and *Hoebee v. Howe*, 97 A.2d 223 (New Hamp, Sup. Ct., 1953), the court then held that the obvious intent of the Federal Act was "to hold the owner liable as an operator." Referring to the Iowa statute which defined "operator" in substantially identical language to that used in 49 U.S.C.A. § 1301(26), the court said:

> "It therefore appears plaintiff's contention that by the language used in Section 328.1, subsection 14, the owner is, for liability purposes, identified with and treated as the operator, must be sustained. As the operator of an aircraft being operated in a careless or reckless manner and in violation of the care required in Section 328.41, he would be negligent per se and must be held liable to anyone damaged as a natural consequence of such conduct.
>
> "It is indeed hard to see any other reasonable interpretation of these laws. The words are clear, and while it may well be as contended by defendant that originally the legislature did not intend this chapter as one to

> give rise to an action for tort, or to extend the owner's personal liability beyond the common law provisions, by the recent amendments any doubt as to the import of the language is removed. * * *." 85 N.W.2d at p. 626.

In *Sosa v. Young Flying Service*, 277 F.Supp. 554 (S.D. Tex. 1968), the owner-defendant rented an aircraft to a student pilot, who crashed the plane killing all persons on board, including the plaintiff's decedents. The owner-defendant filed a motion to dismiss contending the Federal Aviation Act was not applicable. The trial court overruled the motion to dismiss on all points holding that the defendant was legally responsible for the negligence of the pilot to whom he had rented the aircraft, even in the absence of a respondeat superior relationship, citing *Hays v. Morgan*, 221 F.2d 481 (5th Cir., 1955), *Hoebee v. Howe*, 97 A.2d 223 (New Hampshire Sup. Ct., 1952) and *Lamasters v. Snodgrass*, 85 N.W.2d 622 (Iowa Sup. Ct., 1957).

In *Ross v. Robert G. Apple, d/b/a Sheridan Airport*, 240 N.E.2d 825 (Ind. App., 1968), the defendant leased a plane to a pilot who crashed while attempting a takeoff. The plaintiff, a passenger, was seriously injured and filed suit against the owner-defendant, alleging that the Federal Aviation Act of 1958 and the rules and regulations of the Federal Aviation Agency rendered the owner-defendant liable for the negligence of the pilot. The trial court sustained a general demurrer to the allegation against the owner-defendant. On appeal, the court reversed and remanded for trial

and quoting with approval *Hoobee v. Howe*, and citing *Lamasters v. Snodgrass*, and *Hays v. Morgan*, held, "• • • the amended complaint clearly state facts sufficient to raise this issue and the plaintiff-appellant should be given an opportunity to introduce his evidence on that point at trial."

In light of the congressional history of the Federal Aviation Acts and the above authorities, it is obvious that by enacting 49 U.S.C.A. § 1301(26) and its predecessors, Congress sought to protect the public from any negligence and financial irresponsibility of pilots by imposing vicarious liability upon one who allows his aircraft to be flown by another. One of the paramount reasons for the passage of the Federal Aviation Acts was to promote safety in aviation. The effect of 49 U.S.C.A. § 1301(26) is to promote greater safety in aviation by protecting the public from the hazards of aviation through imposition of liability upon one who authorizes another to operate his aircraft. By holding such persons responsible for the negligent conduct of those they allow to operate their aircraft, greater precautions will be taken in determining the pilot's qualifications, training, instructions, supervision and financial responsibility.

Public policy will best be served by placing the responsibility for the negligence of a financially irresponsible pilot upon one who causes or authorizes the use of his aircraft. This was recognized in 1955 by the Fifth Circuit in *Hays v. Morgan*, when the court said:

> "It is the evident intent of the statute to protect the public from any negligence and financial irresponsibility of pilots."

As matters now stand, most aircraft renters do not carry liability insurance covering the renter pilot, but carry insurance which only protects the value of the aircraft and the owner. In the absence of 49 U.S.C.A. § 1301(26) thousands of financially irresponsible pilots would be endangering the lives and property of the public each day. By strict application of § 1301(26), renters of aircraft will be forced to protect the public against financially irresponsible pilots by passing the cost of their insurance along to the renter pilot in the rental charge or by requiring that the renter pilot show evidence of financial responsibility. In 1965 there were 19,393 private pilots licensed in the United States. This was a 40% increase over a five year period beginning in 1960. A study conducted by the Federal Aviation Administration in 1966 revealed that in 1965, 50% of the 196,393 pilots rented aircraft.[1] The vital interest the Congress has in imposing financial responsibility on this vast number of renter pilots cannot be questioned.

The Fifth Circuit's opinion disregards these policy considerations and goes to great length to distinguish *Hays v. Morgan*, supra, *Lamasters v. Snodgrass*, supra, and *Hoobee v. Howe*, on the grounds that Mis-

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[1]Report No. FAA DS-66-15, "Study to Determine the Flight Profile and Mission of the Certificated Private Pilot," Department of Transportation, Federal Aviation administration, Aircraft Development Service, July, 1966.

sissippi, Iowa and New Hampshire had enacted a state statute identical to 49 U.S.C.A. § 1301(26). It seems axiomatic that if these identical state statutes intended to overturn the common law and make the bailor of an aircraft liable for the bailee's negligence, the *congressional* intent in enacting 49 U.S.C.A. § 1301 (26) must have been the same. If this was the intent of the state legislatures, certainly the congressional intent would not be different. Why would these states choose to clearly express their intent by enacting provisions taken from 49 U.S.C.A. § 1301(26) unless the same legislative intent was obvious from the congressional enactment? The Fifth Circuit's opinion does not answer these questions. Rather, under the guise of "federal-state comity" the court holds that Sec. 1301(26) was not intended to pre-empt state law.

Under the Fifth Circuit's holding there is no uniform application of regulations concerning air commerce. Federal control is not exclusive, but rather, is subject to the correlative interests of the state where an airplane crashes, for it is only in those states where legislation has been enacted patterned after the Federal Aviation Act that owners can be held responsible for the negligence of the pilot flying their aircraft. Such a result makes a mockery of Mr. Justice Jackson's statement in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 299 (1944), when, in describing the authority by which aircraft use the airspace, he stated:

> ". . . Its privileges, rights, and protection, so far as transit is concerned, it owes to the fed-

eral government alone and not to any state government." 322 U.S. at p. 303.

Premises considered, petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on November 16, 1970.

Respectfully submitted,

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## PROOF OF SERVICE

I, Tom H. Davis, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of February, 1971, I served 2 copies of the foregoing Petition for Writ of Certiorari on Respondents by mailing the copies, in duly addressed envelopes, with postage prepaid, to their attorneys of record, Mr. Jack Pew, Jr., 4300 First National Bank Bldg., Dallas, Texas 75202.

Tom H. Davis

Tom H. Davis

## APPENDIX A

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 28666

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VIOLA ROGERS, GUARDIAN, ET AL.,
Plaintiffs-Appellees,

versus

RAY GARDNER FLYING SERVICE, INC., ET AL.,
Defendants-Appellants.

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Appeal from the United States District Court for the Northern District of Texas

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(November 16, 1970)

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Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

SIMPSON, Circuit Judge: This appeal requires us once more to examine the amorphous subject of federal pre-emption. The precise question is whether Title 49, U.S.C., Section 1301(26)[1] preempts the Oklahoma

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[1] "§ 1301. Definitions
As used in this chapter, unless the context otherwise requires —

• • • •

(26) 'Operation of aircraft' or 'operate aircraft'

law of bailments as it bears upon the liability of an owner-lessor of an airplane for the negligent acts of a non-agent operator-lessee.

This is a wrongful death action arising out of the crash of a private plane on January 2, 1967, in Oklahoma. Federal jurisdiction is based on diversity of citizenship. Gordon Hunter, a citizen of Texas, was pilot of the plane. The other occupants were his wife, Johnnie R. Hunter, and her sister, Ella Dunn. All three were killed in the crash, which occurred near Ardmore, Oklahoma, on a return trip to Wichita Falls, Texas, from Arkansas. Hunter was a member of the United States Air Force stationed in and a resident of Wichita Falls. The plaintiffs-appellees, Mr. and Mrs. Rogers, are Arkansas citizens, the parents of Mrs. Hunter and Mrs. Dunn. Mr. and Mrs. Rogers sued individually and Mrs. Rogers asserted a separate claim as guardian of the minor children of Mrs. Hunter by a previous marriage.

The defendants below, appellants here, are Ray Gardner Flying Service, Incorporated, a fixed base operator in Wichita Falls, and Ray Gardner, the president of the corporation, individually. The plane was owned by Les Wilson[2] and had been leased by Wilson

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means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter."

[2]Wilson was originally a defendant in this action but was subsequently dismissed from the suit.

to the corporate defendant, which in turn rented it to Hunter under oral agreement.

Appellees alleged that Hunter was negligent in the operation of the plane, and that such negligence was the proximate cause of the accident in which all occupants of the plane perished. They did not contend that the appellants exercised any control over the operation of the plane, that appellants were present in the plane, or that Hunter was their agent. Neither do they allege that the plane was negligently inspected or was rented while in a defective condition, or that the appellants were in any other manner negligent. The single thrust of the claim asserted against the appellants was that by operation of Title 49, U.S.C., §1301 (26) the defendants became vicariously liable for the negligence of the operator Hunter, and that this affords the basis for a wrongful death action under the law of Oklahoma.[3]

The controlling issue was raised before the district court by a defense motion for summary judgment. The district court denied the motion, holding that Title 49, U.S.C., §1301(26) "does not provide the source for establishing owner and lessee responsibility for the negligence of the pilot, the cause of action being created by the Oklahoma wrongful death statute". The district judge certified that her order involved a controlling

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[3]The parties are agreed that the Texas conflict of laws rule commands that the law of the place of the tort controls, and that the plaintiff's cause of action, if any, lies under the Oklahoma wrongful death statute. *Marmon v. Mustang Aviation, Incorporated*, 430 S.W.2d 182 (Tex. Sup. 1968).

question of law to which there was substantial ground for difference of opinion, and that appeal therefrom might materially advance the ultimate termination of the litigation. A panel of this Court allowed the appeal, under Title 28, U.S.C., Section 1292(b).

The Oklahoma wrongful death statute, 12 Okla. Stats. Ann. §1053,[4] provides that the defendant is liable only if the deceased might have maintained an action against the defendant for the same act or omission. However, Oklahoma decisions would not allow a cause of action against the defendants below. The Oklahoma Supreme Court has expressly held that the negligence of the bailee of an airplane may not be imputed to the bailor. *Spartan Aircraft Company v. Jamison*, 181 Okla. 645, 75 P.2d 1096 (1938). See also *Randall v. Schuth*, 185 Okla. 204, 90 P.2d 880 (1939).

Appellees apparently concede that no cause of action accrued to them under the Oklahoma law of bailments; they maintain, rather, that Title 49, U.S.C., §1301(26), forms the basis for a cause of action under the Oklahoma wrongful death statute. They point out

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4 "§ 1053. Death-Action for

"When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative if he is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased."

that this section of the Federal Aviation Act of 1958[a] provides that anyone who authorizes the operation of aircraft in the capacity of an owner or lessee or otherwise is deemed to be engaged in the operation of aircraft as defined in the statute. Also, Title 49, U.S.C., §1430 provides:

> "(a) It shall be unlawful —
>
> • • • •
>
> (5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter;".

An agency regulation states that "No person may operate an aircraft in a careless manner so as to endanger the life or property of another". 14 C.F.R. §91.9. The interweaving of these statutory sections and agency rules leads the appellees to the conclusion that if they can prove that the pilot was operating the airplane in a careless and negligent manner, then this declared unlawful conduct is imputed to the defendants by law under the provisions of Title 49, U.S.C., §1301 (26).

In 1948, the following section was added to the Act [now Title 49, U.S.C. §1404]:

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[a]Section 1301 was originally enacted in the Civil Aeronautics Act of 1938, and was retained in the Federal Aviation Act of 1958, which replaced the 1938 Act.

"No person having a security interest in, or security title to, any civil aircraft, aircraft engine, or propeller under a contract of conditional sale, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft, aircraft engine, or propeller under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft, aircraft engine, or propeller so leased, for any injury to or death of persons, or damage to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft, aircraft engine, or propeller, or by the ascent, descent, or flight of such aircraft, aircraft engine, or propeller or by the dropping or falling of an object therefrom, unless such aircraft, aircraft engine, or propeller is in the actual possession or control of such person at the time of such injury, death, damage, or loss."[6]

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[6]The House Committee Report on the amendment, as the reason for exempting security holders and certain lessors, stated:

"Provisions of present Federal and State law might be construed to impose upon persons who are owners of aircraft for security purposes only, or who are lessors of aircraft, liability for damages caused by the operation of such aircraft even though they have no control over the operation of the aircraft. This bill would remove this doubt by providing clearly that such persons have no liability under such circumstances." U.S. Congressional Code Service, 1948, 80th Congress, 2nd Session, p. 1836; House Report No. 2091, 80th Congress, 2nd Session.

The appellees rely on these statutes as evidence of their claim that Congress purposefully considered the question of pre-empting state laws on bailment of airplanes and concluded that only those persons exempted by Section 1404 should not be held liable as operators. They reason that Congress clearly intended to pre-empt state law and to protect the public from the negligence and financial irresponsibility of pilots by imposing vicarious liability upon one who allows his aircraft to be flown by another. Appellees argue that it is sound public policy to place the responsibility for negligence upon the parties in a position to control the use of airplanes and upon those who generally are more likely to be financially responsible.

Appellees contend that we have in fact endorsed their view of the applicable law in the case of *Hays v. Morgan*, 5 Cir. 1955, 221 F.2d 481. They also cite *Sosa v. Young Flying Service*, S.D. Tex. 1967, 227 F.Supp. 554; *Lamasters v. Snodgrass*, 248 Iowa 1377, 85 N.W.2d 622 (1957); *Hoebee v. Howe*, 98 N.H. 188, 97 A.2d 223 (1953), as supporting their position.

We do not question that under its commerce clause powers Congress could pre-empt state law with regard to the liability for injuries resulting from air crashes. But we are not convinced that in this instance Congress has clearly indicated any such intent to supersede state laws of bailments as related to the operation of air-

craft.[7] See *Double-Eagle Lubricants, Incorporated v. State of Texas*, N.D. Tex. 1965, 248 F.Supp. 515, appeal dismissed 384 U.S. 434, 86 S.Ct. 1601, 16 L.Ed.2d 670, and the cases cited therein. If Congress had any such intent toward pre-emption in this area it was fully capable of making that intent clear directly and not by indirection requiring the circuitous reasoning plaintiffs find themselves driven to employ. In our judgment, what Congress did intend was to subject the classes

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[7]Congressional intent or purpose to pre-empt state law may be shown in various manners. In *Rice v. Santa Fe Elevator Company*, 331 U.S. 218, 230, 67 S.Ct. 1146, ——, 91 L.Ed. 1447, —— (1947) it was said:

> "So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611; *Allen-Bradley Local v. Wisconsin Employment Board*, 315 U.S. 740, 749. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co.*, supra. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538."

Under neither of these tests are we persuaded that preemption was intended by Congress in the present situation.

of persons named in Title 49, Sec. 1301(26), equally with pilots to the rules, regulations, and penalties provided in the Federal Aviation Act. Several courts have in fact concluded that civil remedies for damages as a means of enforcing the act were not envisioned by Congress. *Yelinek v. Worley*, E.D. Va. 1968, 284 F.Supp. 670; *Mounger v. Brandt*, W.D. Wis. 1966, 250 F.Supp. 445; *Southeastern Aviation, Incorporated v. Hurd*, 209 Tenn. 630, 355 S.W.2d 436 (1962), appeal dismissed 371 U.S. 21, 83 S.Ct. 120, 9 L.Ed.2d 96 (1962).

We have been cited no case and we have found none from our independent research in which this precise subject has been before any of the Courts of Appeal. However, the issue was treated in depth by Chief Judge Arraj of the District of Colorado in *Rosdail v. Western Aviation, Incorporated*,* 1969, 297 F.Supp. 681. That court stated:

> "* * * We disagree, however, that Congress intended to alter common law principles with a definitional section of a regulatory scheme. The Federal Aviation Program regulates the licensing, inspection and registration of aircraft and airmen. It makes no provision for its application to tort liability and in fact provides that nothing in the Program shall abridge or alter the remedies now existing at common law or by statute. 49 U.S.C. §1506. Responsibility placed upon owners and lessors

*The *Rosdail* case is the subject of a student casenote at 48 Texas Law Review 488 (1970).

by §1301(26) arises merely in the context of violations of the Program and regulations promulgated pursuant thereunder. Furthermore, responsibility is in the nature of express civil and criminal penalties as provided for in §§1471, 1472 and 1474 of the Program." (297 F.Supp. 684-685).

We are in accord with the reasoning and result reached by *Rosdail*. Tort law has historically been left to the states. We reiterate our disbelief, in the absence of clearer evidence, that Congress would undertake to alter the tort laws of numbers of states in such oblique fashion.[9]

Appellees' reliance upon our earlier decision in *Hays*, supra, page 6, is a mistake. In *Hays* the State of Mississippi had expressly incorporated the language of the Federal Aviation Act into the law of that state, Code Miss. 1942, Sec. 7536-26(9) and 7536-12, and we were hence interpreting state law. It is one thing to say that the words of a state statute impose vicarious liability on the owners and lessors of an airplane. When those same words embodied in a federal statute are relied upon to widen state tort liability it is necessary

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[9]Although we have not independently researched the laws of all of the states with regard to the bailment of airplanes, counsel for the appellants allege that the adoption of appellees' preemption argument would alter the law of some eighteen states (Arizona, Georgia, Hawaii, Idaho, Maryland, Minnesota, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, and Wisconsin) in addition to Oklahoma.

additionally to consider federal-state comity and the requirement that Congress clearly manifest an intention to exercise fully its power under the commerce clause.

The *Lamasters* and *Hoebee* cases, supra, were likewise cases where state laws patterned after the Federal Aviation Act were being interpreted. Only *Sosa*, supra, involved an interpretation of the Federal Aviation Act. That decision appears to us to be based upon the same incorrect reading of *Hays* successfully urged by appellees upon the court below.

We are not unsettled by the 1948 amendment, Title 49 U.S.C., §1404. That section excludes certain persons from liability for injuries *on the surface of the earth*. On its face it was enacted to facilitate financing of the purchase of aircraft by providing that those holding security interests would not be liable for injuries caused by falling planes or the parts thereof. This provision appears *clearly* and forthrightly to pre-empt any contrary state law which might subject holders of security interests to liability for injuries so incurred. If the Congressional intent was as clearly stated with regard to Title 49, U.S.C. §1301(26) our task would be correspondingly simpler. In the absence of similar clear manifestation of Congressional intent we find nothing in Title 49, U.S.C. §1404 which supports construction of Title 49, U.S.C., §1301(26) so as to pre-empt state law.

With leave of court the appellees have filed with the Court a post-submission brief in which it is urged that

the recent opinion of the Supreme Court of the United States in *Moragne v. State Marine Lines, Incorporated*, 398 U.S. 385, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) bears upon this case. In *Moragne*, a longshoreman was killed while working aboard a vessel on navigable waters within the State of Florida. His widow brought an action against the owners of the vessel in a state court to recover damages for wrongful death and for the pain and suffering experienced by the decedent prior to his death. The claims were based upon unseaworthiness of the vessel and negligence. After removal of the case to the federal district court, the vessel owner moved for dismissal of the wrongful death claim on the grounds that maritime law provided no recovery for wrongful death within a state's territorial waters, and that the unseaworthiness was not a basis for liability under the Florida Wrongful Death Act. The district court dismissed the complaint and this Court affirmed after the Supreme Court of Florida answered our certified question[10] by holding that the Florida Death by Wrongful Act statute[11] does not allow recovery for wrongful death based upon unseaworthiness. The Supreme Court reversed, overruling *The Harrisburg*, 119 U.S. 199 (1886), and holding that a wrongful death action may be brought under general federal maritime law for violation of maritime duty even in the absence of a cause of action under state statute.

Appellees attempt to analogize this decision with the instant case by urging that they may now bring this wrongful death action for alleged breach of federally

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[10]Under F.S.A., Sec. 25.031, and Fla. Supreme Court Rule 4.61.
[11]F.S.A., Sec. 768.01 et seq.

declared aviation standards even in the absence of a cause of action under Oklahoma law.

Appellants' counter-argument quickly reaches the flaw in appellees' analogy to maritime law. The Constitution of the United States extends the judicial power of the federal courts to admiralty and maritime cases, and the federal courts have therefore been obliged to fashion a general maritime law in the absence of federal statute. Article III, Section 2, Clause 1; *American Insurance Company v. Canter*, 26 U.S. (1 Pet) 511, 545-6 (1828). State legislation which conflicts with general maritime law or federal statute is invalid. See Gilmore and Black, *The Law of Admiralty*, Sections 1-16, 1-17.

Conversely, the commerce clause as interpreted by the courts has left state sovereignty unimpaired except where Congress has clearly indicated an intent to supersede state law. *Rice v. Santa Fe Elevator Corporation*, supra, footnote 7, *Napier v. Atlantic Coast Line Railroad Company*, 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432 (1926); *Double-Eagle Lubricants*, supra. The difference is clearly expressed by appellants' reply to the supplemental brief:

> "Under this constitutional grant, the federal courts, except insofar as precluded by Congressional enactment or inhibited by stare decisis, are free to recognize and apply a judge-made cause of action for wrongful death in an admiralty case, as was done in *Moragne*. The Constitution, however, has not granted the fed-

eral courts any comparable power to fashion their own common law remedies in tort cases arising in the airways."

It becomes clear that the development of the power of the federal government under these two constitutional provisions has been strikingly dissimilar. A clear mandate has been recognized in the maritime area for the establishment of uniform federal law, whereas the delicate problem of federal-state relations has resulted in a more stringent rule that federal preemption under the commerce clause will not be presumed in the absence of a clear indication of the intent of Congress. The analogy to the *Moragne* holding fails to withstand analysis.

The judgment of the district court is REVERSED. The cause is REMANDED with directions to enter summary judgment in favor of the defendants-appellants.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28666

VIOLA ROGERS, GUARDIAN, ET AL.,
Plaintiffs-Appellees,

versus

RAY GARDNER FLYING SERVICE, INC., ET AL.,
Defendants-Appellants.

*Appeal from the United States District Court for the Northern District of Texas*

*ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC*

(Opinion Nov. 16, 1970, 5 Cir., 1970, ___ F.2d ___).

(December 22, 1970)

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

# UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28666

D. C. Docket No. Civ. 7-398

VIOLA ROGERS, GUARDIAN, ET AL,
Plaintiffs-Appellees,
versus

RAY GARDNER FLYING SERVICE, INC., ET AL,
Defendants-Appellants.

*Appeal from the United States District Court for the Northern District of Texas*

Before GODBOLD, SIMPSON and MORGAN,
Circuit Judges.

## JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

**ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to enter summary judgment in favor of the defendants-appellants.**

**It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.**

**November 16, 1970**

**Issued as Mandate: Dec. 30, 1970**

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In the

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1218

VIOLA ROGERS, Guardian, et al,
*Petitioners,*

v.

RAY GARDNER FLYING SERVICE, INC., et al,
*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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February 26, 1971.

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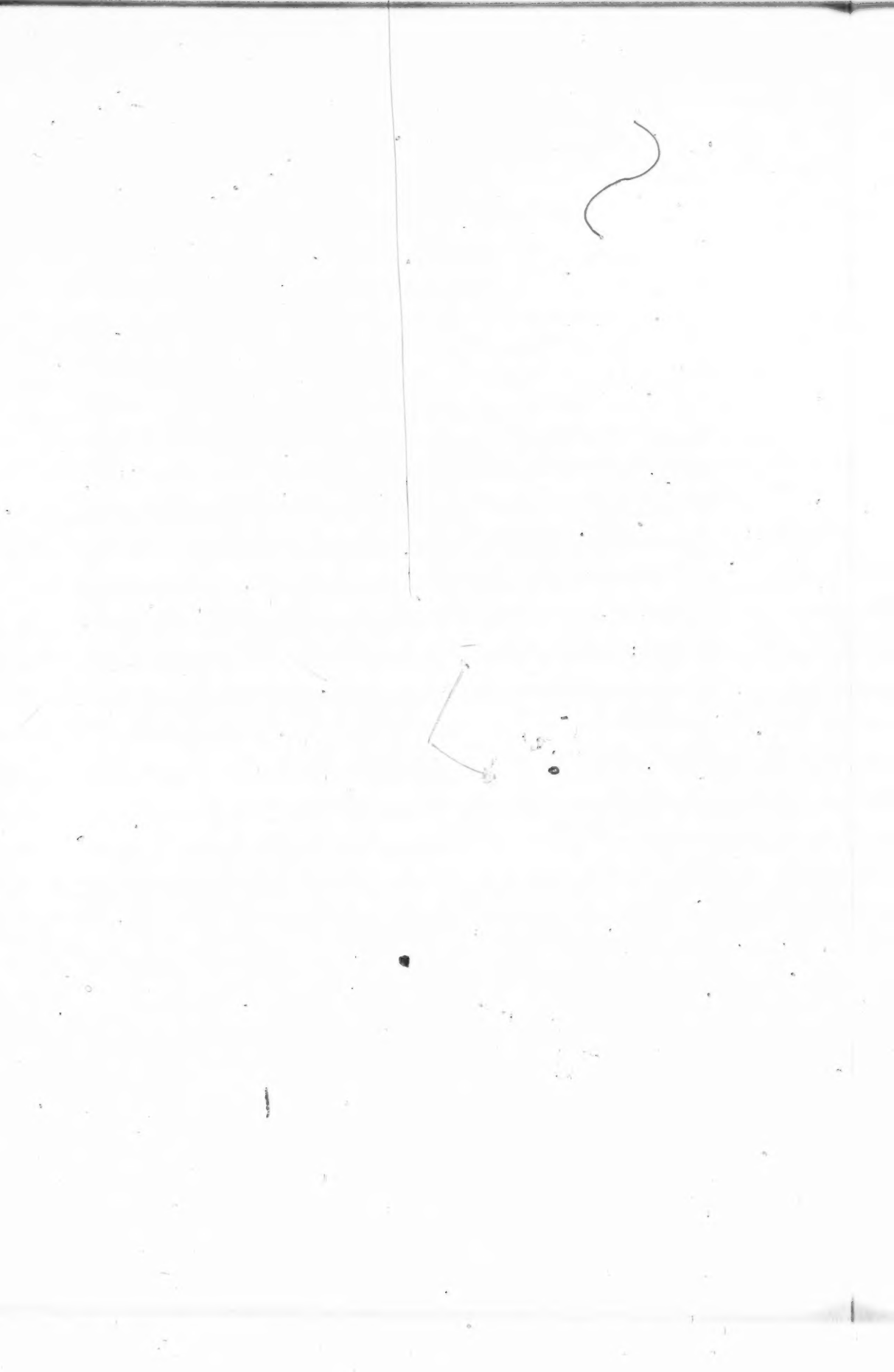

In the

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1318

VIOLA ROGERS, Guardian, et al,

*Petitioners,*

*v.*

RAY GARDNER FLYING SERVICE, INC., et al,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

*To the Supreme Court of the United States:*

### STATUTE INVOLVED

The statute involved in this case is definition no. 26 in the Federal Aviation Act, *49 U.S.C. § 1301 (26)*. It was among the definitions in the original Civil Aeronautics Act of 1938, and was brought forward into the new statute without change when the Civil Aeronautics Act was replaced by the Federal Aviation Act in 1958. The definition reads as follows:

> "As used in this chapter, unless the context otherwise requires —
>
> * * * *
>
> "(26) 'Operation of aircraft' or 'operate aircraft' means the use of aircraft, for the purpose of air

navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter."

## STATEMENT OF THE CASE AND QUESTION PRESENTED

This is an action for damages for wrongful death arising out of the crash of a private plane in Oklahoma. Jurisdiction is predicated entirely upon diversity of citizenship. Although the case comes from a Texas federal district court, it is agreed that Oklahoma law applies.[1]

Petitioners' decedents were passengers killed in the crash. The sole cause of the crash was the negligence of the pilot, but petitioners have not sued the pilot (who was the husband of one decedent and the brother-in-law of the other)[2]; rather, they have sued the lessors, respondents, from whom the pilot had rented the

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[1]Texas, in wrongful death cases, follows the law of the place of the tort. *Marmon v. Mustang Aviation, Inc.*, *430 S.W. 2d 182 (Tex. Sup., 1968)*.

[2]The pilot was Gordon Hunter, a licensed pilot. Passengers were his wife and his wife's sister, Ella Dunn. They had rented the plane in Wichita Falls, Texas, had flown from Wichita Falls to Arkansas, and were returning to Wichita Falls when the crash occurred near Ardmore, Oklahoma. Everyone on board was killed. Plaintiffs-petitioners, Mr. and Mrs. Rogers, citizens of Arkansas, were the parents of Mrs. Hunter and Mrs. Dunn; they brought suit individually, and Mrs. Rogers sued as guardian of Mrs. Hunter's minor children by a prior marriage. (R. 1-2; Deposition of Mrs. Rogers 4.)

aircraft.'

Since petitioners do not claim that respondents were in any way negligent, and do not claim that the pilot was respondents' agent, petitioners concede, as they must, that they have no cause of action against respondents under Oklahoma law: the Supreme Court of that state has squarely held that the non-negligent bailor of an aircraft is *not* liable for the negligence of the bailee. *Spartan Aircraft Co. v. Jamison, 181 Okl. 645, 75 P. 2d 1096 (1938)*; see Opinion below 4. Petitioners, therefore, are seeking to create a right of recovery against respondents under federal law. Their sole theory—as they frankly admit, the "single thrust" of their case (Petition for Writ of Certiorari 4)—is that they may impute the pilot's negligence to respondents, and thus recover damages from respondents, by virtue of definition no. 26 (" 'operation of aircraft' or 'operate aircraft' ") in the Federal Aviation Act, *49 U.S.C. § 1301 (26)*, quoted at pp. 1-2 hereof. In short, petitioners here seek damages from respondents on the theory that in 1938, when Congress inserted this definition in the

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'Respondents-defendants are Ray Gardner Flying Service, Inc., which is a fixed base operator in Wichita Falls, and Ray Gardner, president of that corporation. The plane was owned by Les V. Wilson, Jr., who had leased it to Ray Gardner Flying Service, Inc., by written agreement. Ray Gardner Flying Service, Inc., in turn, rented the plane to Gordon Hunter under an oral agreement. (R. 8; Deposition of Ray Gardner 7.) Wilson, the owner, originally was a defendant in the case but was dismissed by plaintiffs. (R. 5.) Mr. Gardner, individually, apparently is in the suit on the theory that the corporation is his alter ego. He would deny any such relationship, if necessary, but the point is not material in the present status of the case.

Civil Aeronautics Act, Congress intended thereby to preempt the field of tort liability in airplane ballments, to overturn the rule existing in Oklahoma and the great majority of states, and to impose upon all the states a federal rule that the non-negligent bailee of an aircraft is liable for the negligence of the bailee.

Although petitioners, in the Fifth Circuit, filed three briefs on original submission and one brief on rehearing, their theory failed to persuade any member of the Court. The panel which heard the case (Judges Gewin, Simpson, and Morgan) were not convinced "that Congress would undertake to alter the tort laws of numbers of states in such an oblique fashion" (Opinion 10), and, so, unanimously rejected petitioners' theory; the same panel unanimously denied petitioners a rehearing, and the Court unanimously denied them a rehearing en banc.[1]

The question before the Supreme Court, in this damage suit, is whether certiorari will be granted to review petitioners' theory.

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[1] The case had reached the Fifth Circuit on respondents' interlocutory appeal, under 28 U.S.C. § 1292(b), from the order of the district court overruling respondents' motion to dismiss this suit. (R. 4, 5, 11, 12) The district court entertained this preliminary theory of contributory negligence on the sole ground of liability then asserted by petitioners against respondents. (R. 5) The Fifth Circuit, on appeal, has upheld the district court and ordered that judgment be rendered for respondents.

## ARGUMENT

This argument will submit that the Fifth Circuit was clearly right in refusing to accept petitioners' theory, that such decision easily withstands all the attacks made upon it in the Petition for Writ of Certiorari, and that, accordingly, there is no reason for the decision to be reviewed by this Court.

### A. The language and context of the definition.

In testing petitioners' contention that Congress, in 1958, intended for a definition in the Civil Aeronautics Act to preempt the field of tort liability in airplane collisions and establish a federal rule that the negligence of an aircraft bailee will be imputed to a non-negligent bailee, we begin with the following considerations, which petitioners cannot dispute and have never attempted to dispute in any court.

1. In virtually all the states, the common law rule is, and always has been, that a "bailor is not liable to third persons for their injuries resulting from the bailee's negligent use of the thing bailed." *8 C.J.S.*, "Bailments," § 49, p. 479 *(1952)*. This is the rule in Oklahoma, whose law applies to our case. *Spartan Aircraft Co. v. Jamison, 181 Okl. 645, 75 P. 2d 1092 (1938)*.

2. As to injuries sustained by passengers, this common law rule was the rule which, as of 1938, the Commissioners on Uniform State Laws were proposing for adoption by the states in § 6 of the Uniform Aero-

vention Act.[1] As of 1959, the legislatures of 32 states had adopted § 6 of the Uniform Act[2]; such statutes are in effect today in 19 states.[3]

3. No doubt, under the Commerce Clause, Art. I, § 8, cl. 3, Congress could overturn all these state laws

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[1] Of the Uniform Act provided that the owner of an aircraft would be absolutely liable for damages caused by the operation, or the negligent operation, of the aircraft by any person using or operating the aircraft with the permission, express or implied, of the owner. [illegible] [illegible] [illegible]

and establish a federal statutory rule that the holder of an aircraft is liable, without fault, for the holder's negligence, but before the courts will hold that Congress has done this, it must be shown that preemption "was the clear and manifest purpose of Congress." See *Rice v. Santa Fe Elevator Company*, 331 U.S. 218, 230 (1947), and the other authorities cited at footnote 7 of the opinion below. Particularly is this so when, as here, it is claimed that Congress has preempted state rules of tort, an area which "has historically been left to the states." (Opinion 10.) See *Carroll v. Lanza*, 349 U.S. 408, 413 (1955); *Collins v. American Radiator, Inc.*, 350 U.S. 630, 631 (1956).

4. The definition upon which petitioners rely certainly does not say that it is intended to preempt or even affect state rules of tort; on the contrary, the definition appears to be operative only within the confines of the "chapter" which is now the Federal Aviation Act (and formerly was the Civil Aeronautics Act). The statute specifies, as it has since its inception in 1938, that the definition applies "as used in this chapter" and "within the meaning of this chapter." 49 U.S.C. § 1301 (26).

5. Indeed, the "chapter" in which the definition appears is not even a tort statute; the Civil Aeronautics Act-Federal Aviation Act is "an administrative measure, limited to the regulation of the operation of aircraft in the interest of public safety." *Southeastern Aviation,*

*Inc. v. Hurd*, 289 Penn. 630, 285 S.W. 2d 426, 449 (1962), app. dism., 371 U.S. 31 (1962). Many courts have observed that, as said in *Volinski v. Worley*, 204 F. Supp. 679 (E.D.Va., 1962):

> "Implying a civil remedy for damages would appear to be clearly foreign to the Congressional purpose for enactment of the Act." (204 F. Supp. 681.)

Moreover, the statute itself has the following proviso, 49 U.S.C. § 1506:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Against this undisputed background, we may focus on the theory which petitioners urge on this Court. In 1938—at a time when the states, in the exercise of their traditional power over the domain of torts, had long since established the common law rule that a bailor is not liable for the bailee's negligence; at a time when the Commissioners on Uniform State Laws were advocating that the common law rule be adopted by express statute in cases of damage sustained by airplane passengers; at a time when 22 states had enacted such statutes; at a time when Congress well knew that it

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Vanek, Perez v. Southwestern Aviation, Inc., 191 F. Supp. 42 (D.D. Penn., 1961); Williams v. Consolidated Convention Co., 171 F. Supp. 385 (E.D. Va., 1959); Hardy v. McDonnell, 180 F. Supp. 84 (N.D. Miss., 1960); Chesney v. Rusk, 188 F. Supp. 466 (W.D. Wis., 1960); Randall v. Western Aviation, Inc., 207 F. Supp. 881 (D. Colo., 1962).

"will never be held" that Congress intends to supersede state law "unless its purpose to effect that result is clearly manifested," *Reid v. Colorado*, 187 U.S. 137, 148 (1902)—Congress said, in a regulatory and administrative act:

> "As used in this chapter • • • Any person who owns or authorizes the operation of aircraft • • • in the capacity of owner, lessee, or otherwise • • • shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter."

What petitioners want this Court to do is to grant certiorari and hold that at that time, under those circumstances, and by that language, it was the clear and manifest purpose of Congress to say:

> "In an action for death or injury to a passenger a bailed aircraft, brought under the laws of one of the several states, the bailee shall be liable to the plaintiffs for the negligence of the bailee, any statute, policy, or rule of decision of that state to the contrary notwithstanding."

Merely to state petitioners' position is to raise this obvious question: if Congress intended to enact a rule that bailees shall be liable for the negligence of the bailee, why did not Congress simply say so? Petitioners have never tried to answer this question in any court, nor have they ever cited any instance in which Congress has undertaken to preempt state laws by what the Fifth Circuit aptly calls "the circuitous reasoning plaintiffs find themselves driven to employ." (Opinion 8.)

It appears, in fact, that, on the relatively few occasions when Congress has decided to alter state tort rules, Congress has been careful to make its intent known in clear and unambiguous language. An example is the Carmack Amendment, *49 U.S.C. § 20 (11)*. In most states, the common law is that, absent special contract, the initial carrier is liable to the shipper only for safe carriage over its own lines; its responsibility ends upon delivery of the goods to a connecting carrier. See *Inland Waterways Corp. v. Standard Commercial Tobacco Co., 65 F. 2d 715, 717 (6 Cir., 1933)*. In 1906, Congress decided that, for interstate shipments, it would make the initial carrier responsible for the shipment all the way to destination, thus affording the shipper the right to sue the initial carrier for all damage and leaving the latter to obtain recoupment for damage done on the lines of the connecting carrier. *Missouri, K. & T. Ry. Co. v. Ward, 244 U.S. 388 (1917)*. The Carmack Amendment, making this change, did not rely upon any definition in a regulatory statute; rather, it explicitly said that the initial carrier "shall be liable" to the shipper for damage to the property "caused by it or by any common carrier * * * to which such property may be delivered." *49 U.S.C. § 20 (11)*. Another example, this one from the aviation field, is the Warsaw Convention: intending to override state laws and require international air carriers to assume the burden of disproving negligence on their part in passenger injury cases, the treaty says that the carrier "shall be

liable" for passenger injury but "shall not be liable" if it can prove freedom from fault. Warsaw Convention, Arts. 17, 20, 49 Stat. 3000, 3018-3019 (1934). Conversely, as the Fifth Circuit observed (Opinion 11), and as will be discussed in more detail at pp. 18 to 22 of this Brief, when Congress, in 1938, intended to supersede the statutes of 19 states and exempt mortgagees of aircraft from the vicarious liability for ground damage imposed by such statutes, Congress expressed this intent by saying that: "No person having a security interest in • • • any civil aircraft • • • shall be liable" for damage caused by such aircraft "on the surface of the earth." *49 U.S.C.* § *1404*. Surely, then, if Congress had intended to impose federal vicarious liability upon aircraft bailors (reversing the common law and nullifying 22 state statutes in the process), Congress would have explicitly said that the bailor "shall be liable" to persons injured by the bailee's negligence, or would have used some other direct, unambiguous phraseology. Congress would not have depended upon a definition in a regulatory act—let alone in a regulatory act which disclaims any purpose to "abridge or alter the remedies now existing at common law or by statute." *49 U.S.C.* § *1506*.

When definition no. 28 (" 'operation of aircraft' and 'operate aircraft' "), relied upon by petitioners, is read in context, it is quite plain that Congress had no thought of using it to change the bailment laws of the several states. The definition, as the statute twice says, applies

within the "chapter" which constitutes the Federal Aviation Act: the definition is that "as used in this chapter" one who allows his aircraft to be operated by another "shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter." The "chapter" makes it unlawful to operate an unregistered aircraft or an aircraft not eligible for registration, *49 U.S.C.* §1401(a), to operate an aircraft for which there is not currently in effect an airworthiness certificate, *49 U.S.C.* §1430(a)(1), to operate as an air carrier without an air carrier operating certificate, *49 U.S.C.* §1430(a)(4), to operate aircraft in air commerce in violation of any F.A.A. rule, regulation, or certificate, *49 U.S.C.* §1430(a)(5), or to operate a United States ens plane or other aircraft on the high seas in contravention of federal regulations. *49 U.S.C.* §1430(a)(6). Violations are subject to a civil penalty of $1,000.00 for each such violation, and the aircraft is subject to a lien for the penalty. *49 U.S.C.* §1471. Moreover, the "chapter" provides that aggrieved persons may file complaints with the Agency, *49 U.S.C.* §1482, that the Administrator may reinspect aircraft and reexamine airmen and may amend, suspend, or revoke certificates and licenses, whether for equipment or personnel, *49 U.S.C.* §1429, and that the Board or Administrator may apply for injunctive relief against violations of the "chapter" or the regulations promulgated thereunder. *49 U.S.C.* §1487.

Clearly, then, in providing that a bailor is operating an aircraft "within the meaning of" and as the term is "used in" the Federal Aviation Act, what Congress intended, as the Fifth Circuit says, "was to subject the classes of persons named in Title 49, Sec. 1301 (28), equally with pilots to the rules, regulations, and penalties provided *in the Federal Aviation Act*." (Opinion 8, emphasis the court's.) Petitioners have shown nothing in the language or the context of the definition which will admit of any other construction.

B. The legislative history.

Petitioners say, however, that the intent on the part of Congress, for the definition of "'operation of aircraft' or 'operate aircraft'" to impose various vicarious liability upon aircraft bailors, is "clearly" revealed by the "congressional history of the Federal Aviation Acts." (Petition for Writ of Certiorari 8.) We submit that, on the contrary, it is precisely this "congressional history" which shows beyond question that Congress has never considered that the definition had any such effect.

At the outset, it is to be noted that petitioners' "congressional history" does not extend back to 1926 when the definition was enacted,[1] nor does it include any statement by any member of Congress which even begins to support petitioners' theory. The reason is

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[1] President Roosevelt signed the Civil Aeronautics Act on June 23, 1938. 52 Stat. 937, 1029 (1938).

that no such history exists. As we pointed out in our "Appellants' Reply to Brief for Appellees" in the Fifth Circuit (pp. 4-9 and the appendices thereto), and as petitioners have not denied, it appears that, in all the discussions which preceded the adoption of the Civil Aeronautics Act, the definition of "'operation of aircraft' or 'operate aircraft'" was never debated at all—not on the floor of Congress, not in the committee reports, not even, so far as could be determined, in any contemporary literature. If petitioners are correct in their interpretation of this definition, then Congress established a federal rule of vicarious liability, reversed the universal common law rule, and nullified the Uniform Aeronautics Act and 22 state statutes, without even once discussing the subject."

Petitioners do not challenge this point. They do not rely upon any direct expression of congressional intent—in 1938 or at any other time. All their "congressional history" consists of is a species of backward reasoning by petitioners, predicated on petitioners' own misquotation of a 1948 amendment to the Civil Aeronautics

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"One of the persons most actively engaged in drafting the Civil Aeronautics Act was Mr. Charles E. Rhyne, later president of the American Bar Association. After the statute was enacted, Mr. Rhyne published a treatise, *The Civil Aeronautics Act Annotated, With the Congressional History Which Produced It, and the Precedents Upon Which It Is Based (Nat'l Law Book Co., 1939)*. Mr. Rhyne's purpose was to show from the legislative history of the statute "what Congress intended to accomplish by the enactment of each provision thereof." *Ibid.*, p. x. He included a discussion of what he regarded as the "most important" definitions in the Act—the definitions of "air carrier," "air commerce," and "air transportation." *Ibid.*, p. 71. Surely, a definition which established federal vicarious liability of bailors and overturned 22 state statutes would have been included in Mr. Rhyne's list of "important" definitions, but Mr. Rhyne did not mention the definition of "'operation of aircraft' or 'operate aircraft'" anywhere in his treatise.

Act. They presented the same argument—and the same misquotation—to the Fifth Circuit.

Petitioners say that this 1948 amendment was designed to relieve security owners-bailors from the vicarious liability which, petitioners claim, was imposed upon bailors by the original Civil Aeronautics Act. Therefore, petitioners conclude, Congress must have considered that it had created such liability by the definition of "'operation of aircraft' or 'operate aircraft'" in the Civil Aeronautics Act of 1938, otherwise the 1948 amendment would have been unnecessary. The difficulty with petitioners' argument is that its premise is mistaken; a correct quotation of the 1948 amendment, together with its legislative history, shows that what the amendment was directed to was not any alleged *federal* vicarious liability, but, rather, the *state* vicarious liability which is imposed by *state* statute in the states which have adopted § 5 ("Damage to Land") of the Uniform Aeronautics Act.

The 1948 amendment, now *49 U.S.C. § 1404*, reads in its entirety as follows:

> "No person having a security interest in, or security title to, any civil aircraft, aircraft engine, or propeller under a contract of conditional sale, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft, aircraft engine, or propeller under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft, aircraft engine, or propeller so leased, for any injury to or death of persons, or damage to

> or loss of property, on *the surface of the earth* (whether on land or water) caused by such aircraft, aircraft engine, or propeller, or by the ascent, descent, or flight of such aircraft, aircraft engine, or propeller or by the dropping or falling of an object therefrom, unless such aircraft, aircraft engine, or propeller is in the actual possession or control of such person at the time of such injury, death, damage, or loss." (Emphasis added.)[*]

It is thus seen that the 1948 amendment does not grant security owners any relief from liability to passengers in the mortgaged aircraft, the exemption is only from liability for damage caused by the aircraft "*on the surface of the earth.*" Petitioners might have been more conscious of this limitation if, when quoting the statute to this Court (Petition for Writ of Certiorari 9), they had not placed three stars at the point in the statute where the words "on the surface of the earth" appear.

When the 1948 amendment is correctly quoted, however, and when we recall the provisions of § 5 of the Uniform Aeronautics Act (quoted at p. 6 hereof) and consider the background of the 1948 amendment, the purpose of that amendment becomes quite clear. With the enormous development of aviation after World War II, banks and other lending institutions were anxious to finance purchases of aircraft, but they were concerned that a lender who retained any security interest in an aircraft might be regarded as an owner of the aircraft, subject to the absolute liability for ground damage which is imposed on aircraft owners by § 5 of

[*]The references to aircraft engines and propellers were added in 1959. See pp. 19 to 22 of this Brief.

the Uniform Aeronautics Act. The 1943 amendment was enacted to remove this obstacle to the financing of aircraft.

This purpose, indeed, is made plain by the House Committee Report on the 1943 amendment, only a part of which Report is set out on pp. 9-10 of the Petition for Writ of Certiorari. After the language relied upon by petitioners, the Report quotes § 5 of the Uniform Aeronautics Act, recites that § 5 is "in force in at least 10 states and Hawaii," and goes on to explain:

> "This provision thus imposes absolute liability on owners of aircraft for damage caused on the surface of the earth. It is susceptible of a construction which would impose liability upon any person registered as owner, even though he holds title only as security under a mortgage or similar security instrument or as lessor under an equipment trust. If such interpretation were adopted, the security title holder could become liable for extensive damages on the surface caused by the operation of the aircraft. An owner in possession or control of aircraft, either personally or through an agent, should be liable for damages caused. A security owner not in possession or control of the aircraft, however, should not be liable for such damages. This bill would make it clear that this generally accepted rule applies and assures the security owner or lessee, that he would not be liable when he is not in possession or control of the aircraft."

The Report concludes:

> "• • • It is the conviction of the committee that the bill should be passed to remove one of

> the obstacles to the financing of purchases of new aircraft." House Report No. 2091, U.S. Congressional Code Service, 80th Congress, 2nd Sess., pp. 1836, 1837 (1948)."

Now, if as petitioners contend, the Civil Aeronautics Act of 1938 had imposed federal vicarious tort liability upon aircraft lessors, that liability would not be limited to damages on the surface of the earth, it would cover injury to or death of passengers as well; and, certainly, no one would deny that the threat of vicarious liability for passenger injury or death would be at least as serious an "obstacle to the financing of purchases of new aircraft" as the threat of liability for ground damage. The 1948 amendment, however, attempting to remove such obstacles, only grants relief from liability for ground damage. There can be but one reason. Congress did not consider it necessary to grant security owners any relief from vicarious liability for passenger damage, because it knew that no such liability existed —either under state common law, or under the Uniform Aeronautics Act (see § 6, quoted at p. 6 hereof), *or under federal statute*. Congress felt that the only threat of such liability lay in the liability for ground damage imposed by the statutes of those 10 states which had adopted § 5 of the Uniform Aeronautics Act. Indeed, when the 1948 amendment reached the

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"The reason the 1948 amendment exempts leases under leases "of thirty days or more" is that leases are sometimes executed in connection with financing arrangements and such a lease "would almost certainly be" for thirty days or more. *Ibid.*

floor of the Senate, the following took place just before it was passed:

> "Mr. CORDON. Mr. President, may we have an explanation of the bill?
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> "Mr. BREWSTER. Mr. President, at the present time there is some question whether, *under the laws of 10 States*, one who has a mortgage on an airplane may not be liable for damages in the case of an accident or collision. Such liability seems entirely unwarranted, and the purpose of the bill is to protect such persons." *93 Cong. Rec. 6307 (1948)*, emphasis added.

If there could be any doubt about the matter at all, it is fully dispelled by action which Congress took in 1959. As planes became larger and more expensive, it became customary to finance aircraft engines and aircraft propellers separately from the aircraft itself, so, in 1959, a bill was introduced to amend the 1948 amendment to extend its protection to security holders and lessors of aircraft engines and propellers. On that occasion, General Aircraft & Leasing Co. proposed that, in addition, the 1948 amendment should be amended to grant relief from vicarious liability for passenger damage as well as ground damage. The Senate Committee on Interstate and Foreign Commerce referred the suggestion to the Federal Aviation Agency and received an opinion, dated April 16, 1959, from Mr. E. R. Quesada, the Administrator.

The opinion observed that the purpose of the 1948 amendment (then known as Section 504) had been:

> "• • • to assure that the holder of a security interest would not be subjected to absolute liability

> solely by virtue of such security interest under section 5 of the Uniform Aeronautics Act, which has been adopted by some jurisdictions."

The opinion went on to point out that, "absent a specific statute," the general rule is that the owner of a vehicle is not liable for the negligence of the bailee. Finding no such statute applicable to passenger damage, the opinion concluded that there was "no evidence of a present threat" that vicarious liability would be imposed on a security holder for such damage, and, accordingly the Agency recommended against adoption of General Aircraft & Leasing Co.'s proposal.[*]

In accordance with the Agency's opinion, the Senate Committee reported out the bill, with the amendment extending protection to security owners of engines and propellers, but without removing the limitation as to ground damage. The Senate Report recommending the bill for passage, read in pertinent part as follows:

> "Section 504 was added to the original Civil Aeronautics Act in 1948 (62 Stat. 470) to overcome the possible adverse effect on security owners *of various State statutes making an aircraft owner or operator absolutely liable for any damage caused on the ground by the aircraft.* Its purpose was to assure that liability *under such laws* would not attach to the holder of a security interest solely by virtue of that interest * * *. [I]t is logical that the protection afforded to security owners of air-

[*] The F.A.A. opinion may be found at pp. 29-30 of the transcript of March-April 1959 hearings of the Aviation Subcommittee, Senate Committee on Interstate and Foreign Commerce, on "Financing of New Jet and Turboprop Aircraft." The opinion was included in full as an appendix to our "Appellants' Reply to Brief for Appellees" in the Fifth Circuit.

craft by this section of the act should also be given to those having a separate security interest in engines and propellers." *Senate Report No. 221, 86th Cong., 1st Sess (1959)*, emphasis added.

The House Report on the bill read in pertinent part as follows:

> "As presently written, the effect of section 504 is to relieve any person having a security interest in an aircraft • • • from any liability he might have by reason of such interest *for injury or damage on the ground* caused by the operation of the aircraft, unless such aircraft is in his actual possession or control. Unless section 504 is amended to extend to persons holding security interests in aircraft engines and propellers the same limitation of liability now extended to those holding similar interests in aircraft, the former cannot be assured of exemption from liability for *damage on the surface of the earth* caused by the operation of the aircraft in which the aircraft engine or propeller is installed." *House Report No. 455, U.S. Code Congressional and Administrative News, 86th Cong., 1st Sess., 1762, 1763 (1959)*, emphasis added.

Congress passed the 1959 amendment to *49 U.S.C. § 1404* without deleting the "surface of the earth" limitation. The limitation is in the statute today.

So, far from supporting petitioners' theory, the 1948 and 1959 amendments, *49 U.S.C. § 1404*, destroy it. Those amendments show that Congress did not consider that the field of aircraft bailor liability had been federally preempted; by enacting the amendments, Con-

gress recognized that such field has been left to the states. That is the reason Congress enacted the 1948 and 1949 amendments—to exempt security owner-lessors from the ground damage liability imposed by state laws. Moreover, those amendments show that Congress did not consider that there is any federal law imposing vicarious liability on bailors for passenger damage; otherwise, Congress would surely have relieved security owners from that liability in the 1948 and 1949 amendments and would not have limited those amendments to the granting of relief from liability for ground damage. From the enactment of the statute in 1938, through the 1948 and 1949 amendments, and to the present day, the legislative history of the Civil Aeronautics Act-Federal Aviation Act in every respect confirms the Fifth Circuit's refusal to accept petitioners' theory.

### C. The Cases

The language, context, and legislative history of the definition being so squarely against them, petitioners' most heavily emphasized argument is that this Court should grant certiorari in order to rule that petitioners' theory has been accepted by precedent. (Petition for Writ of Certiorari 5, 10-15.) Petitioners' cases, however, do not sustain their position. In none of them was the court required to rule upon the issue here presented—whether definition no. 26 in the Federal Aviation Act does place vicarious liability upon aircraft bailors.

Petitioners' primary reliance is upon an earlier decision of the Fifth Circuit, *Hays v. Morgan*, 221 F. 2d 481 (5 Cir., 1955). There, the court had before it *Miss. Code*, 1942, § 7536-26 (9), which adopts "for the purpose of the laws of this state relating to commerce" the same definition of "'operation of aircraft' or 'operate aircraft'" that appears in the Federal Aviation Act, and *Miss. Code*, 1942, § 7536-12, which makes it unlawful for any person to operate an aircraft in a "careless or reckless manner." 221 F. 2d 482. The plaintiff, while standing on the ground, was struck and seriously injured by a negligently operated plane which was being used for crop dusting; the Fifth Circuit allowed plaintiff recovery against the owner of the plane, who was not the pilot. While it would seem from the opinion that liability of the owner could have been upheld on the basis that the pilot was his agent, the opinion also ruled that the owner, by virtue of the definition, *Miss. Code*, 7536-26(9), was deemed to be operating the aircraft himself "within the meaning of the statutes of Mississippi," and, as, was liable for the pilot's negligence. To the same effect are decisions of the New Hampshire and Iowa Supreme Courts, construing the statutes of their respective states. *Hoehoe v. Howe*, 98 N.H. 168, 97 A. 2d 232 (1953); *Lamasters v. Snodgrass*, 249 Iowa 1377, 85 N.W. 2d 622 (1957)."

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[3] In the other state law case relied upon by petitioners, *Ross v. Apple*, 249 N.W. 2d 855 (Ind. App., 1956), an Indiana appellate court was asked to determine the effect of the Federal Aviation Act upon Ohio law, but it refused to rule on the question and returned the case to the trial court for further evidence. The court suggested, curiously, to regard the issue as one of fact rather than of law.

These decisions are fully discussed at pp. 7-10, 11 of the opinion below. We only add that these cases were not concerned with the intent of Congress, and any expressions therein about such intent are dicta; all that was before these courts was the intent of state legislatures. It is not necessary, therefore, to agree or disagree with the holdings in these cases. It may well be, as *Hays*, *Hooker*, and *Lamasters* say, that the legislatures of Mississippi, New Hampshire, and Iowa, by copying the definition of "'operation of aircraft' or 'operate aircraft'" for use within the meaning of their own state laws, did in fact intend to overturn their common law and establish, for themselves, a state statutory rule of vicarious bailor liability. That, however, is no evidence that Congress, by enacting the original definition for use within the meaning of an administrative and regulatory statute, has "clearly manifested" an intent to preempt the statutory and common law of *all* states and impose upon *all* states a federal rule of vicarious bailor liability, notwithstanding the many state statutes and rules of decision to the contrary.

If state statutes and cases are to be considered as indicative of congressional intent, the decision most closely in point is *Haskin v. Northeast Airways, Inc.*, *266 Minn. 210, 123 N.W. 2d 81 (1963)*. In 1943, Minnesota enacted an administrative and regulatory statute establishing and fixing the duties of a department of aeronautics; regulating airports, approaches, and the licensing of pilots; and forbidding stunt flying. The

statute contained the same definition of "'operation of aircraft' or 'operate aircraft'" which appears in the Federal Aviation Act and in the Mississippi, New Hampshire, and Iowa statutes. Since 1929, however, Minnesota has had a statute adopting § 6 of the Uniform Aeronautics Act, which, as we have seen (pp. 5 to 6 of this Brief), codifies the common law rule that the bailor of an aircraft is not liable to passengers therein for the negligence of the bailee. In *Haskin*, a suit by an injured passenger against the bailor, it was contended that the definition in the 1943 statute had established vicarious bailor liability for Minnesota, repealing § 6 of the Uniform Aeronautics Act. The Minnesota Supreme Court rejected that contention. Noting that when the Minnesota legislature has intended to impose vicarious liability, it has done so in plain language," the Court held that the definition simply made the bailor responsible for compliance with the 1943 statute. *123 N.W. 2d 84.* The Court refused to hold that the Minnesota legislature intended for the definition to "render the civil liability section of our statute a nullity." *123 N.W. 2d 85.* The same reasoning reinforces the Fifth Circuit's holding that the definition in the Federal Aviation Act applies, as it says, only within the meaning

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"The Court noted:

> "Minn. St. 170.54 provides: 'Whenever any motor vehicle . . . shall be operated upon any public street or highway of this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof.'" (123 N.W. 2d 85.)

of that Act, and its refusal to hold that Congress intended for the definition to "render * * * a nullity" the common law rule in virtually all the states and the civil liability statutes in those 22 states in which § 6 of the Uniform Aeronautics Act was the statutory law.

Other than the instant decision, the only federal case which has ruled on the issue now before the Court is *Rosdail v. Western Aviation, Inc., 297 F. Supp. 681 (D. Colo., 1969).*" After a most thorough and scholarly discussion, Chief Judge Arraj determined, in *Rosdail*, that the responsibility placed upon bailors by *49 U.S.C. § 1301 (26)* "arises merely in the context of violations of the [Federal Aviation] Program and regulations promulgated pursuant thereunder." Of petitioners' theory of recovery, Judge Arraj said:

> "[T]here is a paucity of reasoning to explain how Congress intended to change the legal relationships of owners and bailees, with respect to actions under state law for the recovery of damages in tort, by a definitional section to a regulatory statute which section states that an owner is deemed to be an operator *for the purposes of this chapter* (referring to the Federal Aviation Program)." (297 F. Supp. 687, emphasis the court's.)

Therefore, Judge Arraj concluded:

> "[W]e do not find that Congress intended to replace the legal relationships created by state

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"In *Sees v. Young Flying Service, 277 F. Supp. 554 (S.D. Tex., 1967)*, the parties and court *assumed* that the Federal Aviation Act establishes a federal rule of absolute liability on the part of bailors. All the court held was that such rule would apply to intrastate as well as interstate flights.

> common law or statute with respect to tort liability, with the relationship as stated in § 1301 (26) of the Federal Aviation Program." (Ibid.)

The Fifth Circuit in our case agreed with the reasoning and result of *Rosdail*. (Opinion 9-10.)

Thus, petitioners cannot even claim any conflict between the circuits. *Cf. Rule 19(b), U.S. Supreme Court Rules.* The federal cases on the point are in accord and, we submit, are unassailable.

### D. Public policy

Finally, petitioners argue that if Congress did not preempt the field of aircraft bailor liability by a definition in the Federal Aviation Act, then Congress ought to have done so. Petitioners say that since "most aircraft renters do not carry liability insurance covering the renter pilot," then federal preemption must be invoked to prevent "thousands of financially irresponsible pilots" from "endangering the lives and property of the public each day." (Petition for Writ of Certiorari 16.)

Not knowing where petitioners got their information about "most aircraft renters" (certainly not from anything in the record of this case), and unaware of any statistics which would indicate that lessees of private planes, as a class, are "financially irresponsible," we are unable to join petitioners in their alarming vision of thousands of financially irresponsible pilots hurtling through the air if the matter of bailor liability is left

to the states. We suggest that the specter thus raised by petitioners is indeed insubstantial. Of far greater and more immediate concern is the confusion and uncertainty which would result if the courts should depart from the settled rule that a congressional intent to preempt state laws must be "clearly manifested," *Reid v. Colorado, 187 U.S. 137, 148 (1902)*, and thus find preemption of state tort laws in a definition in a regulatory statute by means of "the circuitous reasoning plaintiffs find themselves driven to employ." (Opinion 8.)"

It may be that, at some future date, Congress will decide that the states no longer can be trusted to evaluate such matters as the relative financial responsibility of aircraft bailors and bailees, and that, accordingly, Congress will withdraw this field of tort liability from the states and establish its own rules of aircraft bailor liability. Congress has not done so yet, however; and we are confident that if and when it does take such a drastic step, it will not rely upon a definition in a regulatory statute, but will make its intention known

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"At Footnote 9, at p. 10 of the opinion below, the Fifth Circuit says that we allege that petitioners' preemption argument would "alter the law of some eighteen states." This makes petitioners' argument sound far less drastic than it actually is. What we meant to say is that the argument would alter the *statutory* law of the eighteen states in which § 6 of the Uniform Aeronautics Act is in effect. Also, it would nullify the Rhode Island Statute, *Rhode Island Gen. Laws, § 1-4-3*, which enacts a rebuttable presumption that the owner was negligent even though not present in the aircraft, and the California statute, *California Pub. Util. Code, §§ 21404, 21404.1*, which provides for absolute liability of an aircraft owner but with limitation as to amount, and the law of the many other states which, having no statute on the subject, would follow the common law rule that the bailee's negligence is not imputed to the bailor.

in "clear and manifest" language—and will be impelled by considerations of far greater significance than the unsubstantiated allegations at Petition for Writ of Certiorari 16.

## CONCLUSION

The Fifth Circuit was entirely correct in refusing to accept the tortured reasoning by which petitioners claim a federal intention to preempt state bailment rules through a definition in a regulatory statute. Petitioners have shown nothing, and there is nothing, that could begin to justify review of this damage suit by the Supreme Court of the United States. The judgment of the Fifth Circuit was right, and certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Jack Pew, Jr., one of the Counsel for Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of February, 1971, I served a copy of the foregoing Respondents' Brief in Opposition by mailing a copy in a duly addressed envelope, with first class postage prepaid, to James C. Cole, Phelps Building, Malvern, Arkansas, and Tom H. Davis, 214 Austin National Bank Building, Austin, Texas, Counsel for Petitioners.

Jack Pew, Jr.